No. 85-2079

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, *et al.*,
Petitioners,
v.
ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS FOR LEAVE TO FILE A BRIEF AND BRIEF AS *AMICUS CURIAE*

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MOTION OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 36 of the Rules of this Court, the National Coordinating Committee for Multiemployer Plans ("NCCMP") respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for Writ of Certiorari. Petitioners have consented to the filing of this brief; respondents have not.

INTEREST OF THE NCCMP

The NCCMP is a nonprofit, tax-exempt organization formed after the enactment of the Employee Retirement

Income Security Act of 1974 ("ERISA")* to represent the interests of multiemployer plans and their participants in the regulation of benefit plans under ERISA and other laws. More than 150 multiemployer plans (including the petitioners) and related international unions are members of the NCCMP. These plans are fairly representative of all the nation's multiemployer plans, covering more than nine million workers and their families.

Because of the broad range of experience of the NCCMP's constituent organizations and its close, ongoing contacts with the hundreds of trustees charged with operating multiemployer plans, the NCCMP believes that it is uniquely qualified to provide the Court with insight concerning the practical, negative implications of the decision below for multiemployer plans and to state the position of trustees, participants, and beneficiaries of such plans. In fact, the NCCMP has recently participated as an *amicus curiae* in both *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport Inc.*, 472 U.S. ——, 86 L.Ed.2d 447 (1985) and *Connolly v. PBGC*, 475 U.S. ——, 89 L.Ed.2d 166 (1986).

The NCCMP urges this Court to issue a Writ of Certiorari. Refusal of this Court to review the judgment below will have broad, adverse consequences upon the financial soundness of the NCCMP's member employee benefit plans and, therefore, upon the plans' ability to provide benefits.

ISSUES DEVELOPED BY THE NCCMP

The NCCMP brief focuses on issues which it believes may not be adequately presented elsewhere, including:

(a) the particularly adverse impact that the court's holding below will have on national employee

* ERISA was substantially amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), P.L. 96-364, 94 Stat. 1208 (1980).

benefit policies generally, and on multiemployer plans in particular; and

(b) the fundamental conflict in principle between the decision of the court below and decisions of this Court, as well as a conflict in principle between the decision of the court below and decisions in the other federal circuits.

The NCCMP, therefore, moves for leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

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BRIEF OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The National Coordinating Committee for Multiemployer Plans ("NCCMP") submits this brief as *amicus curiae* to urge the Court to review the holding below that multiemployer plan trustees cannot invoke federal jurisdiction under ERISA to exercise their fiduciary responsibility for collecting delinquent contributions for the period subsequent to the expiration date set forth in a collective bargaining agreement, but prior to the bargaining parties reaching impasse or a new agreement. Instead, the court below held that trustees must seek to invoke the jurisdiction of the National Labor Relations Board (the "NLRB") to secure contributions due and owing during that interim period.

I. INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The nature and purpose of the NCCMP is set forth in the accompanying motion for leave to file this brief. As set forth herein, the NCCMP submits that the decision below offends national employee benefit policies established by Congress and recognized by this Court and, therefore, will have a significant adverse effect upon the nation's multiemployer plans and the benefit security of more than nine million participants and their families.

The impact of the decision below is to force multiemployer plans to provide benefits for hours worked, while denying the self-same plans a judicial forum and, in some circumstances, any forum in which to collect the contributions that should have been paid for those hours worked. That result is totally at odds with the purposes of ERISA. *See, e.g.*, 29 U.S.C. §§ 1001(b), 1001A.

A financially sound pension plan, and one operating within the confines of law, requires a proper actuarial relationship between employer contributions and employee benefits. The necessary predicate to maintaining the legally mandated financial integrity of multiemployer pension plans is the implementation of an ongoing system to collect employee contributions. The inability to collect these contributions can lead to inadequate funding of the multiemployer plans involved.

After the expiration date of a collective bargaining agreement, employees commonly continue to work during the period of negotiations for a new agreement. Such negotiations may continue for extended periods of time. The decision below undercuts efforts to ensure proper funding of employee benefit plans, by encouraging employers to refuse to contribute during the post-expiration period when negotiations are ongoing. This incentive not to contribute, resulting from the decision below, is bolstered by employers' awareness not only that the NLRB may compromise the amount owed to the plan, but also

that the NLRB may require an employer to pay something less than the Congressionally mandated remedy for collection actions brought in federal court, *i.e.*, contributions, interest, liquidated damages, costs, and reasonable attorney fees. 29 U.S.C. § 1132(g)(2). Thus, the decision below undermines the fiduciary authority of trustees and threatens the financial foundation of multiemployer plans.

By enacting ERISA, Congress sought to enhance the financial stability of multiemployer plans and to foster the maintenance and growth of such plans. The legislative history of both ERISA and MPPAA confirms the importance of ready and direct access to the federal courts to collect contributions. Ensuring full funding of pension plan benefits through timely payment of employer contributions is one of the statute's principal objectives. The decision below is contrary to these Congressional goals. It is to elaborate upon these concerns and to place them before the Court that the NCCMP has sought permission to file this brief.

II. SUMMARY OF REASONS FOR REVIEW

A. Consistent with established Congressional policy recognizing the importance of employee benefits to the financial well-being of millions of Americans, 29 U.S.C. §§ 1001, 1001A, this Court has declared that employee benefit plan trustees have an absolute duty of loyalty to plan beneficiaries and the exclusive authority to control plan administration. *See Central States Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. ——, 86 L.Ed.2d 447 (1985); *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981). To fulfill these responsibilities, this Court has consistently recognized the right and duty of multiemployer plan trustees to calculate and collect employer contributions due and owing to employee benefit funds. *See Central Transport*; *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983); *Amax Coal Co.*; *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960).

The independent right of trustees to collect employer contributions is a fundamental prerequisite to the discharge of all fiduciary duties. *Accord, Central Transport*; *Jim McNeff, Inc. v. Todd*; 2 *Scott on Trusts* §§ 170, 171 (3d ed. 1967). Moreover, ERISA expressly directs the federal courts to award not only the delinquent contributions, but also interest, liquidated damages, and the cost of collection, including reasonable attorney fees. 29 U.S.C. § 1132(g)(2). Congress stated its intent that the purpose of this mandatory judicial remedy is to discourage delinquencies and to foster the financial integrity of multiemployer plans. Yet, contrary to these fundamental principles and the express intent of Congress, the court below limited trustees' authority to collect delinquent contributions that are due after the expiration date of a collective bargaining agreement, but prior to impasse or the successful negotiation of a new bargaining agreement.[1] The decision below forces trustees to seek to invoke the jurisdiction of the NLRB, albeit that agency cannot provide the remedies mandated by Congress under ERISA. *Accord, Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940). Yet, Congress directed that plan trustees be given "ready access" to the federal courts, 29 U.S.C. § 1001(b).

The decision of the court below, which failed to recognize federal district court jurisdiction under ERISA sufficiently broad to enable plan trustees themselves to enforce employer funding obligations, threatens the financial integrity of the multiemployer plans that trustees—

[1] The Third and Fifth Circuits and another panel of the Ninth Circuit have all recently reached the same result in similar cases. *Moldovan v. Great Atlantic & Pacific Tea Company, Inc.*, 790 F.2d 894 (3d Cir. 1986); *U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc.*, 790 F.2d 423 (5th Cir. 1986); *Office and Professional Employees Insurance Trust Fund v. Laborers Fund Administrative Office*, 783 F.2d 919 (9th Cir. 1986). The Fifth and Ninth Circuits cited the decision below.

not the NLRB—are obligated to protect. *See, e.g.*, 29 U.S.C. § 1104.

The significance of this issue in the administration of ERISA and the serious hindrance to the effective maintenance and continuation of multiemployer plans warrants review by this Court. *Accord, Rothensies v. Electric Battery Co.*, 329 U.S. 296 (1947); *United States v. Ruzicka*, 329 U.S. 287 (1946).

B. The Congress has chosen to exclude government agencies from the contribution collection process of multiemployer plans. *See* 29 U.S.C. § 1132(b)(2). That point has been underscored by this Court and the Department of Labor, which, as a practical matter, simply does not have "the resources for policing the day-to-day operations of each multiemployer plan in the Nation." *Central Transport, Inc.*, 86 L.Ed.2d at 462. Nonetheless, the court below has forced trustees to resort to the NLRB administrative mechanism in order to exercise their essential fiduciary right to collect delinquent contributions, even though the NLRB may fashion a remedy that compromises the interests of the employee benefit plan. *See, e.g., Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix*, 605 F.Supp. 1441, 1444 (W.D. Mo. 1985); 29 C.F.R. § 101.9(c). However, the NLRB may decline to exercise jurisdiction for various reasons, and its decision to do so is essentially precluded from review. *See, e.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138-39 (1975). Moreover, courts in at least two circuits have asserted that neither employee benefit funds nor their trustees have standing to invoke the jurisdiction of the NLRB. *Board of Trustees, Container Mechanics Welfare/Pension Fund v. Universal Enterprises, Inc.*, 751 F.2d 1177, 1183 (11th Cir. 1985); *Botsford Ready Mix*, 605 F.Supp. at 1447. Applying the ruling below to decisions in these circuits totally precludes the collection of delinquent contributions for the period prior to impasse. Thus, on the one hand, plan trustees would be left without any forum in which

to collect contributions due and owing, but on the other, they would be saddled with the obligation to provide the benefits for which the contributions should have been made. *See Central Transport*, 86 L.Ed.2d at 455 n.7 and 463 n.20.

Absent a uniform rule enunciated by this Court, trustees will be whipsawed between the denigration of their authority by the court below and the ultimate responsibilities imposed on them by the judiciary, *see Central Transport;* by the executive, *see Internal Revenue Service* G.C.M. 39048, and Department of Labor Advisory Op. No. 76-89 (Aug. 31, 1976); and by the Congress, *see* 29 U.S.C. §§ 1001(b), 1001A, 1053, 1054.

III. REASONS FOR REVIEW

A. Multiemployer plan trustees must have an independent, federal cause of action to collect delinquent contributions for the entire period that employers have an obligation to make such contributions.

The purpose of multiemployer benefit trusts and the policy underlying the statute which regulates those trusts are one and the same: to protect the interests of participants and to ensure the receipt of promised benefits. *See* 29 U.S.C. §§ 186(c)(5), 1001(b). The property of multiemployer benefit trusts consists initially of employer contributions, which participating employers have a statutory obligation to pay and fund trustees have a duty to try to collect. *See* 26 U.S.C. § 412 and 29 U.S.C. §§ 1082, 1104, 1106, 1132(g)(2), 1145. Moreover, ERISA "vests the 'exclusive authority and discretion to manage and control the assets of the plan' in the trustees alone . . . 29 U.S.C. § 1103(a)." *Amax Coal*, 453 U.S. at 333.

One of Congress' principal purposes in adopting amendments to ERISA in 1980 was "to strengthen the fundamental requirements and enhance the financial stability

of multiemployer pension plans," *Amax Coal*, 453 U.S. at 338 n.22., by, *inter alia*, assuring that fund trustees will have the ability to recover delinquent contributions quickly and effectively. *Accord*, 29 U.S.C. §§ 1132(g) (2), 1145. Moreover, as the Court acknowledged in *Central Transport*, 86 L.Ed. 2d at 460, trustees have no real choice in this matter. Any failure on the part of fund trustees to pursue diligently their obligation to collect contributions can constitute a breach of their statutory fiduciary obligation, as well as an unlawful extension of credit to a delinquent employer. *Id.*

Furthermore, the fact that an employer has wrongfully failed to make contributions on behalf of an employee has been held not to form the basis for trustees' refusal to pay the employee a benefit. Thus, the entitlement and amount of a pension benefit are a function of hours of service, not hours of service for which contributions were paid. *See Van Gunten v. Central States, Etc.*, 672 F.2d 586 (6th Cir. 1982); *Central States Southeast Pension Fund v. Hitchings Trucking, Inc.*, 472 F.Supp. 1243, 1247 (E.D. Mich. 1979). Moreover, in the view of the Internal Revenue Service,

> a multiemployer plan must credit an employee's years of service even though the employer failed to make the required contributions . . . [b]ecause . . . the employee should not bear the risk of employer non-contribution.

Internal Revenue Service G.C.M. 39048, reprinted in PENS. REP. (BNA), No. 471 at 1764-65 (Nov. 21, 1983).

In order "to make as certain as possible that pension fund assets would be adequate" to pay benefits due, Congress "prescribed standards of conduct" for plan fiduciaries. *Nachman Corporation v. PBGC*, 446 U.S. 359, 375 (1980). *See* 29 U.S.C. § 1104. Therefore, the trustees, upon whom Congress has imposed a nondelegable fiduciary

duty to maintain the financial integrity of the trust, must have a meaningful mechanism to seek to collect the amounts that employers are obligated to contribute. *Rosen v. Hotel and Restaurant Employees, Etc.*, 637 F.2d 592 (3d Cir. 1981).

In this regard, "neither the structure of ERISA nor the legislative history show any Congressional intent that trustees should rely primarily on centralized federal monitoring of employer contribution requirements."[2] *Central Transport*, 86 L.Ed. 2d at 463. Indeed, Congress expressly withheld from the Secretary of Labor the authority to initiate actions to enforce an employer's contribution obligations. *See* 29 U.S.C. §§ 1132(b)(2), 1145. In contrast, "trustees were given the authority to sue to enforce an employer's obligations to a plan." *Central Transport*, 86 L.Ed 2d at 463. "The Court of Appeals' argument obviously conflicts with one of the principal Congressional concerns motivating the passage of the Act, that plans should assure *themselves* of adequate funding by promptly collecting employer contributions." *Id.* at 464. (citations omitted) (emphasis added).

Multiemployer plan trustees must seek to collect contributions from employers, so long as the employers continue to have an obligation to contribute. 29 U.S.C. §§ 1104, 1106, 1145. A trustee determination that an employer has an obligation to contribute to the plan is critical to the administration of the plan. As with all matters of plan administration, the federal judiciary defers to the decision of the trustees, unless the decision is found to be arbitrary and capricious. *See, e.g., Pokratz*

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[2] For example, S.3017 (entitled the "ERISA Improvements Act of 1978") provided, *inter alia*, for the establishment of an independent federal agency—the Employee Benefits Commission—to administer and enforce Titles I and IV of ERISA. Although S.3017 included a provision identical to 29 U.S.C. § 1145, obligating employers to contribute, the bill expressly precluded the proposed Commission from bringing collection actions to enforce the provision.

v. Jones Dairy Farm, 771 F.2d 206, 209 (7th Cir. 1985). *Accord, UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982).

A trustee determination that an employer continues to be obligated to contribute means that participant service with the employer is credited for purposes of pension benefit accrual and vesting. 29 U.S.C. §§ 1053, 1054. To the extent employer contributions are not recovered on behalf of the plan, the ability of the plan to provide benefits generally is diminished. Moreover, to the extent such contributions are not recovered, a plan's underfunding increases.

The 1980 amendments to ERISA were prompted by Congressional anxiety about the financial stability of multiemployer plans and concern that the maintenance and growth of such plans was being discouraged. *See* 29 U.S.C. § 1001A. *See generally* Report of the House of Representatives Committee on Education and Labor on H.R. 3904, H.Rep. No. 96-869 (Part I), 96th Cong., 2d Sess. (April 3, 1980). Certainly, "the purpose of Congress is the ultimate touchstone," *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978), quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963), and the drafters of the 1980 amendments did explain the problem they sought to remedy by the enactment of section 515 of ERISA, 29 U.S.C. § 1145:

> Delinquencies of employers in making required contributions are a serious problem for most multiemployer plans. Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys fees

and other legal costs arise in connection with collection efforts.

These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contributions rates. Moreover, in the context of this legislation, uncollected delinquencies can add to the unfunded liability of the plan and thereby increase the potential withdrawal liability for all employers.

Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously. Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.

Senate Labor Committee Summary and Analysis of Consideration of S.1076 (April 1980) (emphasis added). *See* 126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson); *id.* at 23288 (remarks of Sen. Williams).

Given the clear intent of Congress to foster the financial integrity of multiemployer plans and to provide "ready access" to the federal judiciary, the language of ERISA § 515—which expressly provides the basis for direct federal court jurisdiction of trustee suits to collect contributions where the employer is obligated to contribute "under the terms of the plan or under the terms of a collectively bargained agreement"—is broad enough to include an employer's obligation to contribute in accordance with the terms of the plan or agreement that

has been extended by operation of labor-management relations law.[3]

B. The NLRB does not provide trustees with a forum to satisfy their fiduciary duty of maintaining the financial stability of multiemployer plans.

The court below predicated its decision, that the federal judicial forum should be displaced by the NLRB for collection actions like the instant case, on the premise that plan trustees can invoke the jurisdiction of the NLRB. 779 F.2d at 503. Yet, in *Board of Trustees v. Universal Enterprises*, 751 F.2d 1177, 1183 (11th Cir. 1985), the Eleventh Circuit concluded that multiemployer plan trustees had no standing to invoke the jurisdiction of the NLRB. Moreover, in *Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix*, 605 F.Supp. 1441, 1447 (W.D. Mo. 1985), a district court within the Eighth Circuit asserted that multiemployer plan trustees "are powerless to initiate" an action before the NLRB. Therefore, although "[p]ension plan trustees must have a forum in which to enforce trust obligations," *Laborers Health & Welfare Trust Fund v. Kaufman & Broad*, 707 F.2d 412, 416 (9th Cir. 1983), there is a conflict among the circuits as to whether multiemployer plan trustees can even gain access to the NLRB.[4]

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[3] The court below arrived at a contrary conclusion through a strict construction of a remedial statute. *But see, e.g., Leigh v. Engle*, 727 F.2d 113, 139 (7th Cir. 1984) (ERISA must be construed broadly); 2A *Sutherland Stat. Const.* § 46.07 at 110 (4th ed.).

[4] Multiemployer plans often extend coverage over wide geographical areas. The duties and obligations of the trustees of these plans must, therefore, be uniform throughout the circuits. *Accord, Roberts v. Burlington Industries, Inc.*, 54 U.S.L.W. 3836 (U.S. June 24, 1986), *affirming, Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985); 29 U.S.C. § 1144. This need for consistency is also reflected in the express Congressional directive that the United States courts fashion a federal common law of pensions to fill the statutory interstices extant in ERISA. *See, e.g., Smith v. CMTA-IAM Pension Trust*, 654 F.2d 650, 663 (9th Cir. 1981).

Assuming *arguendo* that trustees have standing to invoke the jurisdiction of the NLRB, the NLRB may of its own volition decline to exercise that jurisdiction. *See, e.g., NLRB v. Marsden,* 701 F.2d 238, 241 (2d Cir. 1983); 29 U.S.C. § 164(c)(1). The general counsel's discretionary decisions regarding the investigation of charges, and the issuance and prosecution of complaints is precluded from review under LMRA § 3(d), 29 U.S.C. § 153(d). *See, e.g., NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 138-39 (1975); *Saez v. Goslee,* 463 F.2d 214, 215 (1st Cir.), *cert. denied,* 409 U.S. 1024 (1972). As the Ninth Circuit itself admits,

> We confess that it is difficult to imagine a situation where the refusal of the general counsel to issue a complaint would violate an express statutory command of the [Labor] Act as it now exists, because nothing in it requires the general counsel to issue complaints upon the finding of a violation. As we have already pointed out, his statutory authority is permissive. 29 U.S.C. §§ 153(d), 160(b).

Baker v. International Alliance of Theatrical Stage Employees, 691 F.2d 1291, 1296-97 (9th Cir. 1982). Thus, forcing trustees to resort to the NLRB is clearly at odds with the Congressional intent to facilitate collection actions in the federal courts. *See* 29 U.S.C. § 1001(b).

Moreover, a proceeding before the NLRB "is not to adjudicate private rights but to effectuate a public policy" of promoting labor peace. *NLRB v. Shipbuilding Local 22,* 391 U.S. 418, 424 (1968). *See Republic Steel Corp. v. NLRB,* 311 U.S. 7, 10-12 (1940). Preserving the financial integrity of multiemployer plans was not even an afterthought in the Congressional design of the statute regulating the collective bargaining process. "The atmosphere in which employee benefit trust fund fiduciaries must operate, as mandated by § 302(c)(5) and ERISA, is wholly inconsistent with this process of compromise and economic pressure." *Amax Coal,* 453 U.S. at 336.

The Congressional intent to give trustees real clout in collection actions by providing for mandatory awards of contributions, plus interest, liquidated damages, costs, and reasonable attorney fees, 29 U.S.C. § 1132(g)(2), is inconsistent with requiring trustees to proceed before the NLRB, where the grant of relief, if any, resides in the sole discretion of the Board.[5] Thus, for example, in *Botsford Ready Mix*, 605 F.Supp. at 1443, the court acknowledged that the NLRB's general counsel settled a union unfair labor practice charge by requiring the employers to pay only 80 percent of the contributions, which the employers owed to the multiemployer benefit plan. *See, e.g., NLRB v. Laborers International Union of North America, AFL-CIO, Local 282*, 567 F.2d 833 (8th Cir. 1977); 29 C.F.R. § 101.9 (permitting the general counsel to settle under terms opposed by the charging party); 29 C.F.R. § 101.4 (case may be disposed of through informal methods of withdrawal, dismissal, and settlement).

This less than adequate remedial power of the NLRB is a broad discretionary one, subject only to limited review. *See Fibreboard Corporation v. NLRB*, 379 U.S. 203, 216 (1964); *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). Consequently, under the decision below, multiemployer pension plan trustees, who must provide full benefits for hours worked, would be at the mercy of the NLRB and its general counsel, who—unlike the trustees—may not be bound by any of ERISA's fiduciary duties in deciding whether and to what extent to exercise the jurisdiction of the Board.

Contrary to "the structure of ERISA [which] makes clear that Congress did not intend for government en-

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[5] "The regulatory scheme established for labor relations by Congress is 'essentially remedial,' and the [NLRB] is not generally authorized to impose penalties solely for the purpose of deterrence or retribution. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940)." *Wisconsin Department of Industry v. Gould, Inc.*, 475 U.S. ——, 89 L.Ed. 2d 223, 229 n.5 (1986).

forcement powers to lessen the responsibilities of plan fiduciaries," *Central Transport*, 86 L.Ed.2d at 462, the decision below diminishes trustees' fiducial authority and undermines the financial stability of multiemployer plans.

CONCLUSION

For the foregoing reasons, the NCCMP respectfully urges this Court to issue a Writ of Certiorari.

Respectfully submitted,

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